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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

99-263

In the Matter of)
)
Southwestern Bell Mobile Systems, Inc.)
Petition for a Declaratory Ruling Regarding the) DA 97-2464
Just and Reasonable Nature of, and State Law)
Challenges to, Rates Charged by CMRS Providers)
When Charging for Incoming Calls and Charging)
for Calls in Whole-Minute Increments)

REPLY COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation and its affiliated telephone and wireless companies ("GTE") hereby submits its Reply Comments in the above captioned proceeding.

I. INTRODUCTION

The Smilow Plaintiffs argue that the Commission should dismiss Southwestern Bell Mobile Systems's ("SBMS's") Petition primarily because the Smilow Plaintiffs' particular claims, supposedly, are claims for breach of contract, not claims challenging SBMS's rates. See Comments of Plaintiffs in the Smilow Action in Response to Southwestern Bell's Petition for Declaratory Ruling, DA 97-2464, at 9-10 (filed Dec. 24, 1997) ("Smilow Plaintiffs' Response"). Based on the Communications Act's clear preemptive effect, this strategy is not unusual -- plaintiffs' class action attorneys throughout the country have attempted to finesse preemption in per-minute billing cases by attempting to disguise the true nature of their rate cases. See, e.g., Mann v. GTE Mobilnet, Civil Action No. 95-8579 (Circuit Court for Jefferson County, Alabama) (filed January 11, 1996) (characterized challenge to per-minute billing as breach of contract and fraud causes of action). Regardless of the labels attached to the plaintiffs' claims, each of these cases is fundamentally a challenge to the reasonableness of

cellular service rates. And, it is the cumulative effect of these cases, rather than the facts of any particular case, that necessitates Commission intervention.

II. ARGUMENT AND AUTHORITIES

The Smilow Plaintiffs recognize that the Communications Act of 1934 indisputably preempts state rate regulation. See Smilow Plaintiffs' Response at 11 ("this section [§ 332(c)(3)(A)] provides only that states cannot regulate the rates charged"); see also 47 U.S.C.A. § 332(c)(3)(A) ("[n]o state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service"). Given the undisputed law, the Smilow Plaintiffs have attempted to manufacture a narrow theory of recovery beyond the reach of the Communications Act's express preemption clause.

The Smilow Plaintiffs emphasize that they have raised "no general economic, political, philosophical, ethical or other generalized challenge to the practices of rounding up." Smilow Plaintiffs' Response at 6. Instead, they protest that preemption does not apply to the unique facts of their case because of the peculiar language of the SBMS contracts.¹ See Smilow Plaintiffs' Response at 6-7 ("Smilow only attacks those practices of Southwestern Bell [rounding up and charging for incoming calls] because they violate the Contract"). Specifically, the Smilow Plaintiffs claim to challenge SBMS's practice of rounding up solely on the grounds that they: (i) "Breached the unambiguous, inclusive Contract, drafted by the defendant, because they were not permitted by, and were in conflict with, the Contract;" (ii) "Were 'unjust' practices in violation of § 201(b) of the Communications Act, because they were not permitted by, and

¹ The SBMS contract provision at issue allegedly states that "[c]hargeable time for calls originated by a Mobile Subscriber Unit starts when the Mobile Subscriber Unit signals call initiation to C1's [Cellular One's] facilities and ends when the Mobile Subscriber Unit signals call disconnect to C1's facilities and the call disconnect signal has been confirmed." Smilow Plaintiffs' Response at 5.

were in conflict with, the Contract;"; and (iii) "Were unfair and deceptive acts and practices, in violation of M.G.L. Ch. 93A, § 2(a), because they were not permitted by, and were in conflict with, the Contract." Smilow Plaintiffs' Response at 6.

The Smilow Plaintiffs' attempt to find a narrow ground for recovery must fail because they are fundamentally seeking retroactive rate regulation. The Smilow Plaintiffs have identified no provision in SBMS's contracts that expressly prohibits per-minute billing. Accordingly, their breach of contract claim is essentially a claim that SBMS's contracts cannot reasonably be interpreted to permit per-minute billing. The Smilow Plaintiff's argument that per-minute billing is "unjust" under Section 201 of the Communications Act, moreover, is nothing more than an argument that per-minute billing is unreasonable. The determination of whether per-minute billing is unreasonable clearly constitutes rate regulation, expressly preempted by Congress in Section 332(c)(3)(A) of the Communications Act.

Although the Smilow Plaintiffs have skillfully but unsuccessfully attempted to avoid the preemptive effect of the Communications Act by focusing on narrow language peculiar to SBMS's contracts, their attempt to pursue the merits of their particular claims against SBMS ignores the public policy concerns presented by the entirety of the cases challenging per-minute billing. It is these concerns, rather than the specific facts surrounding the Smilow case, that should guide the Commission's ruling.

III. CONCLUSION

For the foregoing reasons and on the authorities cited, GTE respectfully submits that the Commission should grant the relief requested by SBMS's Petition.

Respectfully submitted,

GTE Service Corporation and its
affiliated telephone and wireless companies

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January 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 1998, I caused copies of the foregoing Reply Comments of GTE Service Corporation to be mailed via first-class postage prepaid mail to the following:

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